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No. 90-1571

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DOUGLAS ZEPPEIRO,
Petitioner,

v.

SEAMAN & GRAHAM, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner sued the respondents [1] for damages allegedly arising out of a $50,000 loan the petitioner made (along with others, who are not parties hereto) to Ecco Gas Corporation ("Ecco") (also not a party hereto). The collateral for the loan was a gold contract under which Ecco was to receive certain installments of gold and certain leasehold interests in existing oil wells in Ohio which Ecco owned. The collateral, evidenced by documents, was pledged and placed in the hands of respondent Seaman & Graham as escrow agent, which collateral the respondent was to hold until such time as the loan

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[1] There were three respondents at trial: Robert E. Seaman III, a South Carolina lawyer, Robert E. Seaman III, P.A., Seaman's professional association, and Seaman & Graham, a South Carolina partnership of two professional associations.

was repaid. Respondent Seaman was the attorney who drafted the term loan agreement and escrow agreement, which documented the transaction between Ecco and the petitioner. The loan was never repaid and the petitioner has sued various persons and entities in Ohio and South Carolina.

The petitioner's five claims [2] against the respondents were: breach of contract, breach of fiduciary duty, negligence, fraud and fraudulent inducement to contract. Petitioner was represented at trial by counsel. All five causes of action were submitted to the jury, which returned a verdict in favor of the respondents on all counts.

The petitioner's trial counsel timely filed a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial. Thereafter, the petitioner's trial counsel moved to be relieved as counsel, which motion was granted. The petitioner then filed *pro se* a "Request and Pray to Courts for a Mistrial." On April 11, 1990, the Honorable Karen LeCraft Henderson, the trial judge, issued an Order denying the motions for JNOV or new trial and the petitioner's *pro se* "Request." Petitioner filed an untimely notice of appeal in the District Court and on November 19, 1990, the Fourth Circuit Court of Appeals dismissed the appeal as untimely. An untimely petition for rehearing and suggestion for rehearing in banc were also denied by the court of appeals. This petition followed.

REASONS FOR DENYING THE WRIT

The petition for certiorari challenges various trial court rulings, predominantly related to evidence either admitted or excluded. Although the petitioner attempts to cast the alleged errors of the trial court in terms of Constitutional violations, it is clear that there has

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[2] The petitioner's original complaint contained eight causes of action. Three others, for alleged securities fraud and RICO violations and unfair trade practices, were dismissed on summary judgment prior to trial on the applicable statutes of limitation.

been no deprivation of any of the petitioner's First or Fourteenth Amendment rights, nor are there any other compelling reasons for granting the writ.

Furthermore, the petitioner had an opportunity to have these alleged errors reviewed by the Fourth Circuit Court of Appeals, but failed to timely appeal to that court. It is well-settled that a writ of certiorari may not be used as a substitute for an appeal. *Lavinthal v. I.T.S. Co.*, 55 F.2d 232 (3rd Cir. 1932); *Turner v. United States*, 14 F.2d 360, 361 (8th Cir. 1926).

Although it is extremely difficult to discern the petitioner's precise complaints in his petition due to his "stream of consciousness" style of argument, it appears the petitioner has five basic errors which he contends are sufficient to warrant the granting of the writ. They are:

1. petitioner's trial counsel consented to the redaction of irrelevant matters in a trial exhibit and withdrew an element of damages, allegedly without petitioner's consent;
2. the trial court's charge to the jury regarding fraud was misleading;
3. the trial court erroneously granted summary judgment on the securities fraud, RICO and unfair trade practices claims;
4. the trial court erred in excluding certain evidence and witnesses at trial and in its recitation of facts in its various orders; and
5. the respondents' counsel allegedly misrepresented facts in briefs filed by them with the district court and the court of appeals.

None of the above, even if true, which they are not, constitutes grounds for granting the writ, nor are there present any other reasons, such as those listed in Supreme Court Rule 10, that this Court should exercise its discretion of review in this case. A brief review of the intelligible issues raised by the petitioner follows.

Trial exhibits and withdrawn damages (Questions Presented Nos. 1, 6, 9, and 3).

Joint Trial Exhibit No. 1 was a document entitled "Term Loan Agreement". The Term Loan Agreement functioned as a note, whereby the petitioner and others loaned money to Ecco and Ecco obligated itself to repay the loan under certain terms and provisions thereof. During the trial, prior to Joint Exhibit 1 being shown to any witness or offered into evidence in any respect, the respondents moved for a redaction of certain language referring to securities laws in the term loan agreement on the ground that there was no cause of action for securities fraud in the case and that the language was superfluous and could possibly mislead the jury. The petitioner, who was represented by counsel at the trial, consented to the redaction through his counsel.

The petitioner now asserts as grounds for his Writ of Certiorari that the redaction misled the jury and violated his constitutional rights to a fair trial. This argument is fallacious for two reasons. First, the redacted language in no way related to any cause of action or issue in the case. Its redaction from the Joint Exhibit, therefore, could have absolutely no bearing on the jury's consideration of the various causes of action submitted to it at the end of the case. "The exclusion of evidence is squarely within the discretion of the trial judge. *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192 (4th Cir. 1982), and cannot be reversed absent an abuse of that discretion." *DeBenedetto v. Goodyear Tire & Rubber Company*, 754 F.2d 512, 518 (4th Cir. 1985). No such abuse exists here.

Second, the redaction was consented to by all counsel and the exhibit was a joint one, meaning that it was entered into evidence without objection by either party. Therefore, any objection to the exhibit now raised on appeal was waived by the petitioner at trial. *See also Reed v. Ross*, 468 U.S. 1, 13 (1984) and *Wainwright v.*

Sykes, 433 U.S. 72, 91 and n.14 (1977) (habeas reviews). In that same vein, the petitioner's "argument" under Question Presented No. 9 that he uncovered "switched exhibits" and alerted the court of appeals of same is of no consequence, since the petitioner consented to the joint exhibits introduced at trial, including those from which material was redacted and failed to timely appeal any of the above to the Fourth Circuit.

Petitioner's third "Questions Presented" relates to the dismissal of an element of his damages at trial. Specifically, counsel for petitioner stipulated that he was withdrawing the petitioner's claim for emotional distress damages. In the first place, the petitioner was present at the trial and consented to his counsel's withdrawal of this element of damages. Any complaint petitioner now has with the way that his trial counsel handled the trial is not properly before this Court. *Reed*, *supra*, 368 U.S. at 13. Secondly, these damages would not have been recoverable by the petitioner as a matter of law under any of his causes of action. Thus, there was no error in petitioner's attorney dismissing this element of damages.

Trial court's charge to jury on fraud (Questions Presented Nos. 2, 4, and 5).

The petitioner asserts that the trial court erroneously charged the jury that the instant lawsuit arose out of the alleged mishandling of an escrow fund by respondents. Petitioner asserts that the instant lawsuit was actually a continuation of his original lawsuit in Ohio. No such argument was made at trial or before the Fourth Circuit. This Court should not address this argument for this reason alone.

Furthermore, as noted by the petitioner in his "statement of the case," Robert E. Seaman III was an original defendant in the petitioner's Ohio lawsuit, but was dismissed for lack of personal jurisdiction. Thereafter, petitioner filed this lawsuit against Seaman and the other

respondents. Any error in the dismissing of Seaman for lack of personal jurisdiction in Ohio would only be reviewable by the appropriate appellate court in Ohio, not by this Court. There is no evidence that the petitioner appealed the ruling in the Ohio state court. Therefore, any objection in this regard has been waived.

The petitioner also appears to invite this Court to review the trial court's charges to the jury regarding his fraud cause of action, claiming the jury was misled because the trial court charged the jury regarding fraud, fraud in the inducement, and constructive fraud. The petitioner certainly has no constitutional right to have a particular theory of recovery stated as a separate cause of action, nor is there any evidence whatsoever that the jury was misled in any way: the jury simply resolved all issues in favor of the respondents.

Granting of Partial Summary Judgment (Question Presented No. 10).

The petitioner contends that the trial court erred when it dismissed by summary judgment three causes of action originally pled by the petitioner, but barred by the applicable statute of limitations. The petitioner did not appeal the original order nor did he raise this argument at the JNOV or new trial stage or before the Fourth Circuit. Therefore, the issue is not properly before this Court. The petitioner's argument that this suit is a continuation of his action in Ohio, and thus that the statute of limitations has not run, is totally untrue and unsupported by any legal authority.

Exclusion of evidence and recitation of facts by trial court (Questions Presented Nos. 7, 11, 12, 13, 15, and 17).

Questions Presented Nos. 7, 11, 12, 13, 15, and 17 all appear to challenge evidence submitted at trial or recitations of the facts by the trial court in various orders

issued both pre- and post-trial. That petitioner disagrees with the jury's resolution of the evidence presented to it is obvious. However, the petitioner's nearly incomprehensible argument under these "Questions" does not raise a single reviewable issue. No timely appeal from any of the trial court's orders was made, thus making any argument in this petition utterly fruitless and a complete waste of this Court's time.

Misrepresentation of facts by respondents and counsel (Questions Presented Nos. 8, 14, and 16).

Finally, the petitioner attacks certain "misrepresentations" he believes the respondents or their counsel made at various stages of the case, including at trial and in pleadings. For example, under Question No. 14 the petitioner claims respondents and counsel misrepresented in a motion in limine the content and extent of knowledge certain witnesses the petitioner intended to call as a basis for excluding those witnesses at trial. In the first place, there is no evidence of any such misrepresentation. In the second, the petitioner has not perfected any appeal of the trial court's ruling on the motion in limine, and even if he had, he would have been unsuccessful, since, absent an abuse of discretion, the trial court's determination of the admissibility of evidence is not disturbed on appeal. *DeBenedetto*, *supra*, 754 F.2d at 518. Thirdly and ultimately, it is clear that the petitioner will not and perhaps cannot accept that he has had his day in court, with all relevant issues being submitted to the jury, and the jury has resolved his case against him. In other words, the petitioner refuses to accept that he has lost. To suggest, as the petitioner does under Question Presented No. 16, at p. 35, that there has been any failure of justice or mockery of the judicial system, after the petitioner has an ample opportunity to present his case and appeal any errors, is unfounded.

CONCLUSION

The petitioner seeks to appeal his loss at trial by invoking this Court's review under the guise of constitutional errors. The petition should be denied.

Respectfully submitted,

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